IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

STATE OF TENNESSEE,	)	**For Publication**
_____	)	
_____Appellee,	)	**Filed: May 6, 1996**
	)	
v.	)	Williamson Circuit
	)	
TERRY E. WOOD,	)	Hon. Donald P. Harris, Judge
	)	
Appellant.	)	No. 01S01-9501-Cc-00015

DISSENTING OPINION

I write separately in this case to dissent from the majority's conclusion that defendant was not deprived of his right to a speedy trial under federal and state constitutional provisions. I agree wholeheartedly with the majority's recitation of the controlling precedent, but, in my opinion, the conclusion runs afoul of that authority and overrules countless others.

Wood was indicted in September, 1979, and charged with a murder that allegedly occurred in July, 1979. The indictment remained sealed while numerous alias capiases were issued. In November, 1983, the indictment against Wood was "retired" having never been served.

While somewhat ambiguous, the records indicate that, as early as March, 1984, the authorities in Tennessee knew that Wood was incarcerated in Alabama. On March 14, 1984, for example, Alabama corrections officials acknowledge receipt of a Tennessee detainer. Nonetheless, nothing

indicates compliance with the interstate compact on detainers. In effect, neither Tennessee nor Alabama took any action, at least so far as the record demonstrates, following the March 1984 acknowledgment.

Sometime that year Wood learned of the Tennessee detainer. He wrote for information to the Sheriff's Department in Williamson County but received none.

In 1989, Wood was offered parole by Alabama officials contingent on his waiving extradition to Tennessee. Nothing in the record disputes his testimony that he asked for counsel to assist in making the decision. In fact, his later tenacity seems to support that testimony. In any event, the Alabama authorities noted his refusal, and he was not paroled. It is this event on which the majority bases its conclusions that Wood acquiesced in the delay that ultimately resulted in his trial some four years later. In my opinion, this conclusion represents a departure from well-established precedent.

After Alabama denied Wood parole in 1989, he again wrote Williamson County seeking information about the charges and legal assistance. His March 22, 1990, letter to the clerk of the court was answered by the clerk on August 13, 1990. In the response, the clerk referred Wood to the district attorney.

Wood filed a pro se motion for speedy trial in September, 1990,

which was heard in Wood's absence on September 10th. The docket entry for that hearing indicates "detainer lifted."

Two years later, the district attorney issued an alias capias for Wood. He was served in the Alabama prison on October 29, 1992, and tried on February 9, 1993, some twenty-nine months after his demand for a speedy trial.

The majority acknowledges that evaluation of a speedy trial issue requires consideration of four factors which must be balanced. Barker v. Wingo, 407 U.S. 514 (1972). In analyzing these factors, the majority correctly finds that (1) the length of the delay was presumptively prejudicial and weighs in favor of defendant[1] and that (2) the delay was caused by the state's negligence and weighs in favor of defendant.

In my opinion the majority opinion errs, however, when, on the third factor, the majority concludes that defendant failed to assert his right to a speedy trial. This conclusion, based on Wood's reaction to the conditional parole opportunity, is faulty in three regards. First, it finds a wavier of a speedy trial right based on the exercise of an equally cognizable constitutional right, the right to counsel before making a decision regarding extradition. Second, it elevates the demand factor above all else equating a lack of demand with a wavier of the right. Third, it misconstrues the facts in the record before us.

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[1]The majority finds a thirteen-year delay. In my opinion the analysis could just as easily and correctly focus on the twenty-nine month post-demand.

Tennessee authorities knew in 1984 defendant's whereabouts. Although given legal authority to proceed against him, Tenn. Code Ann. §§ 40-31-101 et seq. (1990 Repl.), they did nothing until he demanded a speedy trial. The majority's assertion that defendant "did nothing" from 1984 until 1990 is perplexing. What was defendant to do? He had not been served with an indictment, capias, warrant, or ICD form requesting final disposition. In effect, there was no proceeding against Wood during that period. The majority's attempt to cast the burden to "do something" on Wood, with all due respect, inverts the order of things.

More importantly, however, even if Wood's failure to take affirmative steps in 1984 were relevant, it does not justify the majority's conclusion. Immediately following notification that Alabama, at least, thought Tennessee still had an interest in Wood, Wood sought information. He requested counsel. He demanded a speedy trial. Yet the state delayed another twenty-nine months before trying him. At a minimum, I would balance the Barker factors as follows:

1. The length of delay was prejudicial and weighs in defendant's favor.

2. The delay was unjustified, was caused by the state's negligence, and weighs in defendant's favor.

3. The defendant's demand for a speedy trial after unsuccessful requests for counsel and information, weighs in defendant's favor.

The fourth factor - prejudice by the delay - is most difficult. Courts

have recognized how difficult this factor is to establish and have, accordingly, allowed a presumption of prejudice to attach to excessive delays. There is in this case, however, no proof of particularized prejudice. Nonetheless, at a minimum, the factor should be treated neutrally weighing in neither party's favor.

Balancing the four factors, then, it is abundantly clear that defendant's constitutional speedy trial rights have been violated, and I would so hold preferring that unfortunate result to the one I believe the majority's opinion allows: a prosecution far beyond the time period we have deemed reasonable before in the face of a speedy trial demand.

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Penny J. White, Justice